(4)

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1174

IN THE

Supreme Court of the United States

October Term, 1988

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,
Pro Se Petitioner,

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PRO SE PETITIONER'S REPLY TO THE FOLLOWING NAMED RESPONDENT'S BRIEF—JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION, and ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE

HON. PAUL A. SIMMONS, *Pro Se Petitioner*
Room 837, 8th Floor
United States Court House and
Post Office Building
7th Avenue and Grant Street
Pittsburgh, Pennsylvania 15219
Telephone (412) 644-3566

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

14

Questions Presented for Review

1. Did James Moody, Trustee of the Estate of Jeannette Corporation and the Committee of Unsecured Creditors of Jeannette Corporation and their Attorneys, Robert J. Cindrich, Esquire of Mansmann Cindrich & Titus, and Douglas A. Campbell, Esquire of Campbell & Levine have "legal standing" to act as Petitioners in this bankruptcy case to petition for and obtain a Writ of Mandamus from the United States Court of Appeals for the Third Circuit, directed to this United States District Judge requiring him to vacate a certain "conversion order" which this said District Judge had entered in the above-captioned bankruptcy case?

2. Assuming *arguendo* that the said Mandamus Petitioners in this case had legal "standing" to initiate this Mandamus action, should a Writ of Mandamus be issued on the facts of this case?

3. Is it proper for the Court of Appeals to issue a Writ of Mandamus where it is both legally and physically impossible for the Respondent, United States District Judge to carry out the directive set forth in the writ?

4. Should your Honorable United States Supreme Court in the sound exercise of your inherent supervisory powers over inferior Federal Courts, bar the Law Firm of Mansmann, Cindrich & Titus (headed by Jerome Mansmann) from practicing bankruptcy law in the United States Bankruptcy Courts and bankruptcy law in the United States District Court of the Third Judicial Circuit of the United States for the reason that the Honorable Carol L. Mansmann, the wife of Jerome Mansmann, and as a Judge of the United States Court of Appeals for the Third Circuit, sits on the Court which appoints all Bankruptcy Judges sitting in said Third Judicial Circuit to 14 year terms of office?

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Introduction	1
Discussion of the Four Issues Presented	3
1. The Matter of "Standing"	3
2. Assuming *Arguendo* that the Said Mandamus Petitioners in this Case had Legal "Standing" to Initiate this Mandamus Action a Writ of Mandamus Should not have been Issued on the Facts of this Case Against this Petitioner	4
3. Impossibility Issue	8
4. Practice of Law Issue	8
Conclusion	9

Page

TABLE OF AUTHORITIES.

Cases:

Citron v. Union Pacific Railroad Company, 813 F.2d 917 (9th Cir. 1987) 6
Edelstein v. Wilentz, 812 F.2d 128 (3rd Cir. 1987) .. 6
Liljeberg v. Health Services Acquisition Corp., 486 U.S. _____, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) 4,8
Moon v. Winfield, 368 F. Supp. 843 (SDNY, 1973) 6
Simnonson v. General Motors Hospital, 425 F. Supp. 574 (EDPA, 1976) 6
United States v. Baskes, 687 F. 2d 165 (7th Cir. 1981) 6
United States v. Fiat Motors of North America, Inc., 512 F. Supp. 247 (DDC 1981) 6
United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) 4,5,8

Statute:

28 U.S.C., Section 455 3,4,5,7

Other Authorities:

S. Rep. No. 93-419, 93 Cong., 1st Sess. 1973 7

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1174

THE HONORABLE PAUL A. SIMMONS,
United States District Judge for the
Western District of Pennsylvania,
Pro Se Petitioner,

vs.

JAMES MOODY, Trustee of the Estate of
JEANNETTE CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

PRO SE PETITIONER'S REPLY TO THE FOLLOWING NAMED RESPONDENT'S BRIEF—JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION, and ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE

Introduction

Respondents James Moody, The Committee of Unsecured Creditors, Robert J. Cindrich, Esq., Mansmann, Cindrich & Titus, Douglas A. Campbell, Esq. and Campbell & Levine have filed a "brief" in opposition to the granting of the Petition for a Writ of Certiorari in the above-captioned case.

This Petitioning Judge sadly and regrettably is compelled to state that said "brief" is a sorry reflection of greed and intellectual dishonesty at its worse.

Respondents at page one of their "brief" without citing one example in support of said statement, declare, "Moreover petitioner's 'Statement of the Case' contains scores of so-called facts which are anything but true and undisputed".

This intentionally false "scatter gun" statement by Respondents in their "brief" is a calculated attempt to mislead and divert your Honorable Supreme Court from addressing the genuine and vital issues at hand.

The real truth is that every relevant fact referred to by this Petitioning Judge, without exception, are historical facts which are established indisputably from the contents of the Docket Entries, and Official Court Records that have been filed in this case in the United States Bankruptcy Court for the Western District of Pennsylvania, the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit.

It is truly amazing that the Respondents should question the validity or underlying genuineness of the historical facts set forth in this Petitioner's "Statement of the Case", that are clearly and indisputably supported by the relevant Court records, since but with two general

exceptions, all of said facts were established directly from recorded papers and recorded hearing transcripts that were orchestrated and/or prepared and filed of record by the Respondent-Trustee and Respondent Attorneys in this case. The only two exceptions are (1) the recorded orders, statements and opinions of the various Courts, and (2) the two papers filed on behalf of the Unsecured Employee Creditors, namely, Document "I", 169a and Document "L", 181a.

Further, it is respectfully noted that the within Respondents have not and cannot pinpoint even one relevant fact used in this Petition for a Writ of Certiorari that is untrue.

It needs to be said that contrary to the insinuations of the Circuit Panel and the false statements in the Respondents' brief in this case, this Petitioning Judge bears no malice against these Respondents despite their flagrant unethical behavior as is clearly demonstrated by the very "conversion order" of this Petitioning Judge that triggered this matter now before your Honorable Supreme Court. In said "conversion order" this Judge reluctantly recommended that the Respondent-Trustee and all of the Respondent Attorneys should be reappointed to represent the Bankrupt Estate, but they were to be paid reasonable hourly fees (See Document C, 22a and 24a).

It is clear that the Respondents are not satisfied with reasonable fees, they want the potential of a twelve million dollar fee and the Circuit Panel has approved this callous exhibition of greed and unethical conduct.

DISCUSSION OF THE FOUR ISSUES PRESENTED

1. The Matter of "Standing"

It seems that the legal strategy of the Respondents as well as the Third Circuit Panel is to completely ignore this issue of legal "standing" to litigate and hope that it somehow will go away without discussion.

This fundamental issue is discussed in full beginning at page 17, of the Petition. Suffice it to say that this is the first recorded case in American Judicial History where an Appeals Court has placed the personal financial interests of the attorneys and trustee (all of these Respondents), above the financial interests and wishes of the clients (*i.e.* the Unsecured Creditors of the Bankrupt), who, said Respondents, are duly obligated to fairly represent.

The "conversion order" of this Petitioning Judge directly or by operation of law removed all of the within Respondents from their representative duties with the Bankrupt Estate (See Document C, 22a) (These Respondents already have claimed professional fees and professional expenses as to this Bankrupt in an amount over one million dollars up to October 7, 1987, 55a).

These Respondents can be reappointed as Representatives of the Bankrupt Estate (and this Judge reluctantly has so recommended), but without the right to an unlawful 33% contingent fee order which could give these Respondents outrageous sums of money.

The practical effect of vacating the "conversion order" via the Writ of Mandamus is not to vindicate any public policy associated with Section 455(a), but is to restore these Respondents to their representative positions with the Bankrupt Estate with their unlawful 33% contingent

fee order which could mean a potential windfall for the Respondent Attorneys and the Respondent-Trustee (who also renders accounting services to the Estate) in excess of twelve million dollars to the financial detriment of all of the creditors and against the expressed wishes of the majority of the unsecured creditors.

2. Assuming *Arguendo* that the Said Mandamus Petitioners in this Case had Legal "Standing" to Initiate this Mandamus Action a Writ of Mandamus Should not have been Issued on the Facts of this Case Against this Petitioner.

This Petitioning Judge has relied on *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986), and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. _____, 100 L. Ed 2d 855, 108 S. Ct. 2194 (1988).

The following facts are clearly indisputable in this case:

1. Not one real party with an interest in the Bankrupt's Estate and not one of the within Respondents have accused this Petitioning Judge of abusing his discretion when he entered the "conversion order" (Document C, 22a); and no interested party has admitted and/or contended on the record that they were in any way legally harmed by said "conversion order". See Circuit Panel Opinion, Document B, pages 1 and 18, 4a and 21a.

2. That no appeal of any kind was taken in regard to said "conversion order".

3. That no motion requesting this Petitioning Judge to recuse himself under Section 455(a) has ever been filed even to this date.

At page 4, of their "brief" the within Respondents attempt to distinguish the Murphy case which clearly and without ambiguity requires a motion to be filed in every case if a litigant wants a Judge to stand aside under Section 455(a), by making the following statement:

> "United States v. Murphy—a criminal case in which the defendant waited until after he had been convicted and sentenced to file a Section 455(a) motion for recusal—is so obviously distinguishable as to render petitioner's assertion of 'conflict' untenable. Unlike Murphy, who argued that the judge's actions prior to being asked to recuse should be nullified, the mandamus petitioners below sought only to vacate actions taken after the judge himself acknowledged that recusal was required."

The Respondents have not accurately set forth what this Petitioning Judge "acknowledged". On pages 13, and 14, of the Petition, this matter is discussed at length. Suffice it to say again that this Judge plainly and clearly said on the record that *none* of the matters then before this Judge which led to the issuance of the "conversion order" would require his recusal and that perhaps there would be matters *raised in the future that would require his recusal* but not as of January 29, 1988.

In any event, this issue of when recusal was to have taken place would not have occurred if the required motion had been made in this case.

There are many additional sound public policy reasons why a motion for recusal should be required, and why the *Murphy case cited supra* should be followed by your Honorable Supreme Court.

Multiple factors are to be considered by the Court on application for recusal.

The standard utilized in considering whether the Court should entertain recusal is whether a reasonably disinterested observer, knowing all the facts, would harbor doubts about the impartiality of the courts towards a party to the action. *Edelstein vs. Wilentz,* 812 F.2d 128, 131 (3rd Cir. 1987). *See also, Citron vs. Union Pacific Railroad Company,* 813 F.2d 917, 922 (9th Cir. 1987).

First, a Motion for Recusal is not to be liberally granted as the Court is presumed to be impartial. *United States v. Fiat Motors of North America, Inc.,* 512 F. Supp. 247 (DDC 1981).

Second, the Court has a continuing obligation not to recuse itself if the facts do not warrant a finding of prejudice against a party. *United States v. Baskes,* 687 F. 2d 165, 170 (7th Cir. 1981).

Third, the Court has a continuing obligation to serve if it believes itself free from prejudice against the party. *Moon vs. Winfield,* 368 F. Supp. 843 (SDNY, 1973).

Fourth. In making its determination, the Court should consider the burden it places on the other judges if it grants a Motion for Recusal. *Simnonson vs. General Motors Hospital,* 425 F. Supp. 574 (EDPA, 1976).

Fifth. A Judge should not be lulled into expending hundreds of hours of time on a case only to find belatedly after the resources of the Court have been wasted that there were known facts that would require a Judge's recusal.

Sixth. Litigants who have valid grounds for requiring recusal of a Judge should not be permitted to see whether the Judge rules against them prior to moving for the Judge's recusal.

Congress in passing 28 USC, Section 455 warned:

> In assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are, in fact, seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.
>
> S. Rep. No. 93-419, 93 Cong., 1st Sess. 1973, p. 5.

Seventh. What is also important for the Court to consider is the timeliness of the recusal motion and a formal motion will give opposing counsel opportunity to address the recusal issue and also contest the facts alleged by the moving party in an appropriate manner.

The only practical, accurate and fair way of implementing the above-mentioned factors in considering applications for recusal is to require a formal motion and a hearing on the motion so there will not be, confusion as to the facts and where a Judge will be given written reasons for his proposed disqualification, so the Judge can properly consider said reasons and determine on the record whether the reasons given for recusal are valid or groundless.

Additionally, since the Third Circuit Panel itself found that the action of this Petitioning Judge was uncontested and no abuse of this Judge's discretion has been claimed by any interested party, said "conversion order" was at most harmless error and therefore the conflict

between this case at bar and *U.S. v. Murphy*, cited *supra*, and the recent United States Supreme Court case of *Liljeberg* (cited *supra*) would require that this Petition for Certiorari should be granted (See P. 24 of this Petition for a full discussion).

3. Impossibility Issue

The "brief" of the within Respondents does not address this issue. The Writ of Certiorari should certainly issue based on the ground that it is legally and physically impossible for this Judge to execute the Circuit Panel's direction to vacate the "conversion order", as discussed on page 24 of the Petition.

4. Practice of Law Issue

This Petitioner stands on the discussion of this issue beginning on page 26, of his Petition for a Writ of Certiorari.

Conclusion

For the reasons heretofore set forth in this Judge's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and for the reasons set forth in this Reply to the Respondents' brief in opposition to said Petition, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

HON. PAUL A. SIMMONS
Pro Se Petitioner
United States Post Office &
Court House
Room 837
Seventh Avenue & Grant Street
Pittsburgh, Pennsylvania 15219